Editor's note: Request for Clarification and Reconsideration denied by Order dated June 28, 2001

3MRC-CO. INC., ET AL.

IBLA 94-867 Decided September 24, 1998

Appeal from a decision of the Utah State Office, Bureau of Land Management, declaring 23 placer mining claims abandoned and void. UMC 290384 et al.

Reversed in part, affirmed in part.

1. Mining Claims: Rental or Claim Maintenance Fees--Regulations: Interpretation

When a corporation owns an interest in mining claims, those claims are properly counted toward the 10-claim limit of individuals who are officers and directors of the corporation and who have an interest in it under 43 C.F.R. § 3833.1-6(a)(3) (1993), and those individuals cannot qualify for an exemption from payment of rental fees for their interests in the claims for which they applied. Other claimants who filed Certifications of Exemption for their interests in those claims are not disqualified.

APPEARANCES: Gail D. Schmardebeck, President, 3MRC-Co. Inc., for appellants.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

This is an appeal of the September 1, 1994, Decision of the Utah State Office, Bureau of Land Management (BLM), declaring 23 placer mining claims abandoned and void. We granted a stay of the BLM Decision by Order dated October 31, 1994.

Mining, Manufacturing, Minerals Resources, and Construction, Inc. (3MRC-Co. Inc.) was incorporated in June 1986. In that year and the next, the company's president, vice president, secretary, and a dozen of their family members and friends co-located approximately two dozen mining claims in the Aragonite/Cedar Mountains Mining District of Tooele County, Utah. In the following years, the president regularly filed the affidavits

of assessment work performed on the claims on behalf of himself and "other associated claim holders." 1/

In 1993, after the enactment of the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993 (the Act), Pub. L. No. 102-381, 106 Stat. 1374, some of the claimants attended meetings sponsored by BLM to learn how they could be exempt from paying the rental fees imposed by the Act. As a result of these meetings, the president, Gail Schmardebeck, conveyed his interest in the 15 claims he owned with others, 10 to the corporation, 3 to Ralph Goodell, the company's secretary and chairman of its board of directors, and 1 each to 2 other claimants. Some of the other claimants also conveyed their interests in a manner intended to result in several of them owning interests in 10 claims, some of them owning interests in fewer than 10 claims, and no one owning a majority interest in any 1 claim. Thus, the 20-acre placer claims were co-owned by two claimants, the 80-acre association claims were owned by four claimants, and the 160-acre association claims were owned by eight claimants. 2/ Those who had conveyed some of their interests filed quitclaim deeds with BLM on August 27, 1993.

As result of these conveyances, claimants thought they all were qualified for exemptions for their claims because none of them owned more than 10 claims and none of them owned a controlling interest in any claim. 3/

1/ 3MRC-Co. Inc. says it has been serving for 8 years as "implied agent" for the claimants because "other claimants do not have or [have not] had the resources to perform these actions (see past Assessment Filings)." (Notice of Appeal at 1.) In 1991 and 1992, the secretary joined the president in filing and signing the proofs of labor.

2/ 3MRC-Co. Inc. refers to a hand-out from BLM at an Aug. 10, 1993, public meeting "led by Walt Phelps, Utah BLM Supervisory Land Law Examiner, Mining Claims Unit," and explains:

"We based our actions of deeding (as a safe action) ten (10) fractional claim interests, 3MRC's President's interests, to 3MRC and 3 (three) of his fractional interest to an officer and another officer already had three (3) fractional interests in the claim group on this hand-out and also [another] document, [referred to in] Reason (4) (below) * * *."

(Statement of Reasons (SOR) at 2.) "Regarding Corporations and Controlling Interest, see page 4 and 5," 3MRC-Co. Inc. states. Id. 3MRC-Co. Inc. did not provide either the Aug. 10, 1993, hand-out or the other document it refers to above, identified as "31 July 1993, 16 page, `BLM Presentation on New Fees and Small Miner Exemption' Grants Pass, Oregon, (led by Rodger Haskins, BLM Mining Law Specialist)," (SOR at 3), and neither is contained in the record.

3/ 3MRC-Co. Inc.'s SOR attaches a "Claim Exemption Chart" which it says "shows 3MRC's Fractional Title Interests in the Claim Group and lack of controlling interest * * * ." (SOR at 2.) The chart lists each of the 23 claims and its acreage from top to bottom on the left and shows how many acres of each are owned by each claimant in columns going across

Certificates of exemption were filed on August 30, 1993, by Schmardebeck on behalf of 3MRC-Co. Inc. for 10 of the 23 claims, by Goodell for 3 of the same claims plus another 7 claims, and by James Prudden, the company's vice president, for 1 of the same claims co-owned by Goodell plus another 2 claims. Certificates of exemption for the other four claims were filed by other co-owners.

BLM, having learned that Schmardebeck had claims on file in other states, 4/ issued the September 1, 1994, Decision to 3MRC-Co. Inc. and the other claimants that has been appealed. After noting that Certifications of Exemption for the 23 claims had been timely filed for the 1993 and 1994 assessment years, the Decision stated:

> Pursuant to regulation [43 C.F.R. §] 3833.1-6(a)(1) and (3) [(1993)], "The claimant shall hold 10 or fewer mining claims, mill sites, and tunnel sites on Federal lands in the United States" in order to qualify for the rental fee exemption. "Mining claims held in co-ownership, or by an association of locators, by a partnership, or by a corporation shall be counted toward the 10-claim limit for claimants that have an interest in these entities."
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> 3MRC, with Gail Schmardebeck as president, has filed certifications of exemptions for 10 mining claims. Further review of * * * (BLM) records reflect[s] that Gail Schmardebeck has claims on file with the Montana State Office and Nevada State

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fn. 3 (continued)
from left to right. For example, the White King Placer 2 claim, UMC 306135, is shown as a 20-acre claim of which 3MRC-Co. Inc. and Nonie Clyde are shown as each owning 10 acres; the White King South 1001, UMC 314196, is shown as a 160-acre claim of which eight claimants each owns 20 acres. At the bottom of each claimant's column the total acreage owned is shown along with the percentage this total is of the 1,770 acres covered by all the claims. For example, 3MRC-Co. Inc. owns 188 acres in 10 claims (10.62 percent of the total of 1,770 acres), Ralph Goodell owns 168 acres in 10 claims (9.49 percent), and Jim Prudden owns 40 acres in 3 claims (2.26 percent).

4/ The record includes copies of the June 1992 and 1993 annual reports of the 3MRC-Co. Inc. to the State of Utah Department of Commerce, Division of Corporations and Commercial Code, showing Schmardebeck as president, Prudden as vice president, and Goodell as secretary, and the three of them as the corporation's directors. BLM received these copies on Aug. 23, 1994.

The record also includes an Aug. 10, 1994, Memorandum to the State Director, Utah State Office, BLM, from the State Director, Nevada State Office, BLM, listing 29 claims recorded in Nevada in Gail Schmardebeck's name. The memorandum states that "[n]o small miners exemption or rental fees were filed on these claims."

> Office, BLM. In addition, Ralph Goodell and James (Jim) Prudden have a controlling interest in 3MRC. Ralph Goodell filed certifications of exemption in our office for 10 mining claims. James (Jim) Prudden filed certifications of exemption in our office for 3 mining claims. Therefore, 3MRC, Gail Schmardebeck, Ralph Goodell, and James (Jim) Prudden as co-owners have ownership in more than 10 mining claims.
>
> Co-owners of more than 10 unpatented mining claims do not qualify for exemption of the rental fees and it has been concluded that BLM properly denied an exemption. See Lee H. and Goldie E. Rice, 128 IBLA 137 (1994).
>
> All the claims and owners listed on the certification must meet the requirements. If one owner or one claim does not meet the requirements then none qualify [sic] for the exemption.
>
> Therefore, the above-mentioned claimants do not qualify for the rental fee exemption and the mining claims * * * are hereby declared abandoned and void.

3MRC-Co. Inc. argues BLM's Decision is in error because neither it nor any of its officers owns a controlling interest in any of the claims, because it has not issued any stock, and because "a corporation is held as a separate entity." (SOR at 2.) "Further," 3MRC-Co. Inc. argues, "BLM Rule [43 C.F.R. §] `3833.1-6(a)(1) and (3)' Federal Register 15 July 1993 Part 3730 et. al. and * * * Federal Register/Vol. 59 No. 167/Tues 30 Aug. 94/Rules and Regulations do not account for stock interest in any mining corporation or holding company." (SOR at 2-3.) 5/

[1] The Act provides that a claimant who holds "ten or fewer claims" may qualify for exemption from payment of rental fees. 106 Stat. 1378. BLM's September 1, 1994, Decision is based on 43 C.F.R. § 3833.1-6(a) implementing this language. The regulation provides:

> (a) In order to qualify for an exemption from the rental fee requirements, a small miner shall meet all the following conditions:
>
> (1) The claimant shall hold 10 or fewer mining claims, mill sites, and tunnel sites, on Federal lands in the Untied States. * * *

5/ The Aug. 30, 1994, regulations 3MRC-Co. Inc. refers to here and in "Reason (5)" on page 3 of its SOR, 59 Fed. Reg. 44846 (Aug. 30, 1994), implement the Omnibus Budget Reconciliation Act of Aug. 10, 1993, Pub. L. No. 103-66, 107 Stat. 312, 405-406, and are not relevant to this case. See Alamo Ranch Co., 135 IBLA 61, 72-75 (1996); Kathleen K. Rawlings, 137 IBLA 368 (1997).

> (3) Mining claims held in co-ownership, or by an association of locators, by a partnership, or by a corporation shall be counted toward the 10-claim limit for claimants that have an interest in these entities.

When this regulation was proposed with the same language, people commented that it would prevent individual claimholders who owned stock in corporations holding claims from qualifying for an exemption. BLM replied:

> One comment stated that paragraph (a)(4) excludes any person who owns stock in a mining corporation which holds claims from qualifying personally and separately from [sic] the small miners exemption. This is not true because the legal corporation and the individual are separate entities under this section and are separately eligible for the small miner exemption.

58 Fed. Reg. 38186, 38190 (July 15, 1993).

> One comment said that the word "corporation" should be removed from the section that deals with entities who qualify for the small miner exemption. The entities listed in the rule, including corporations, have always been regarded as "claimants" under the Mining Law. The clear intent of the Act was to exempt all claimants, including corporations, holding 10 claims or fewer. However, there is nothing in the law or this rule to prevent arm's length stockholders of a corporation – stockholders without control – that possess mining claims from locating their own claims and qualifying as small miners, regardless of the number of claims held by the corporation.

58 Fed. Reg. 38186, 38192 (July 15, 1993).

In our view, it would not be reasonable to interpret "have an interest in these entities" in 43 C.F.R. 3833.1-6(a)(3) as tantamount to having any interest. Nor does it appear from the responses to the comments that BLM intended such a broad application. Although the responses may not be fully consonant, it appears BLM intended that a corporation could hold 10 or fewer claims and an individual stockholder of that corporation could hold 10 or fewer claims and both could qualify for an exemption so long as the individual stockholder did not "control" the corporation. This is how we understand the responses that "any person who owns stock in a mining corporation which holds claims" is "separately eligible for the small miner exemption" (comment one above) if the person is a stockholder "without control" (comment two). "The clear intent of the Act was to exempt all claimants, including corporations, holding 10 claims or fewer" (comment two). In a different context, BLM responded to a comment questioning "whether a person who is part of a corporation * * * that qualifies for a 10-claim exemption can also qualify for an additional small miner exemption under his or her own name" with the answer "yes if the person is a non-controlling shareholder of a corporation." 58 Fed. Reg. 38186, 38193 (July 15, 1993).

Owning a controlling number of shares in a corporation would be sufficient for an individual to have control, i.e., to have an interest in the corporation. Being an officer or director of a corporation would also be sufficient to raise a rebuttable presumption of control. In this case, 3MRC-Co. Inc. has an interest in 10 claims. It does not appear that Schmardebeck retained any interest as an individual in any claims in Utah and it is not clear he held any claims in Nevada. The fact that "[n]o small miners exemption or rental fees were filed on these claims" in Nevada, see note 4, supra, may indicate Schmardebeck intended to abandon them. See The Big Blue Sapphire Co., 138 IBLA 1 (1997). Nor is there any evidence in the record supporting the statement in BLM's Decision that Schmardebeck held claims in Montana. Thus, we cannot find a reason to disqualify 3MRC-Co. Inc. from an exemption for its interest in its 10 claims based on ownership of other claims by Schmardebeck.

However, it is clear that 3MRC-Co. Inc.'s 10 claims must be counted toward the 10-claim limit for Goodell and Prudden, who are both officers and directors of the corporation and therefore have an interest in it. Therefore, they cannot qualify for an exemption for their interests in the claims for which they applied. The other claimants who filed Certifications of Exemption for their interests in those claims are not disqualified.

Therefore, in accordance with the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, BLM's September 1, 1994, Decision is reversed in part and affirmed in part.

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Will A. Irwin
Administrative Judge

I concur:

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David L. Hughes
Administrative Judge

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R.W. Mullen
Administrative Judge

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James P. Terry
Administrative Judge

CHIEF ADMINISTRATIVE JUDGE BYRNES CONCURRING:

While sympathetic to the anguish of the dissent, caused by an unartfully drawn regulation, I must concur with the majority. I believe when construing duly promulgated regulations, the Board should follow a basic judicial axiom to construe such enactments in a manner to give them some meaning. Rosado v. Wyman, 397 U.S. 412, 415 (1970). This does not, however, bind the Board to apply this regulation should a future factual situation work a manifest injustice. See Alamo Ranch Co., Inc., 135 IBLA 61 (1997).

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James L. Byrnes
Chief Administrative Judge

ADMINISTRATIVE JUDGE ARNESS CONCURRING SPECIALLY:

While the result announced by Administrative Judge Irwin is correct, his opinion rewrites the controlling regulation, 43 C.F.R. § 3833.1-6(a) (1993), so that only persons having a controlling interest or holding office in a corporation owning mining claims need report that fact when claiming entitlement to a small miner exemption from rental fees. There is no basis in the rule for this interpretation; in relevant part, the regulation states that: "Mining claims held in co-ownership, or by an association of locators, by a partnership, or by a corporation shall be counted toward the 10-claim limit for claimants that have an interest in these entities." 43 C.F.R. § 3833.1-6(a)(3) (1993). The rule is clear as written; it prohibits ownership of "an interest" in more than 10 claims for persons claiming to be small miners, without exception or limitation.

Although the rule is unambiguous, Judge Irwin looks to language provided by comments and responses thereto published with the final rulemaking to inject a limiting meaning into the phrase "an interest" so that, as changed by his interpretation, the phrase now means "owning a controlling number of shares" and "being an officer or director of a corporation." No such words appear in the rule itself, nor does the explanation published with the comments to rulemaking provide a foundation for the notion that an element of control is needed before "an interest" is acquired by a mining claimant who also holds stock in a corporation that owns mining claims. Cf. 58 Fed. Reg. 38186, 38190, 38192 (July 15, 1993). While a regulatory preamble may sometimes be a helpful aid to interpret an ambiguous rule, it may not be used to cancel or amend a regulation. See Marathon Oil Co., 139 IBLA 347, 353 (1997) and authorities cited therein. To support a theory that the phrase "an interest" refers to a controlling interest or position in the manner described by Judge Irwin requires another rulemaking, which should include notice and publication of such a substantial change to Departmental rule 43 C.F.R. § 3833.1-6(a)(3).

Nonetheless, on the record before us, it appears that the corporate claim holder and a number of other claimants each owned an interest in only 10 claims, while both Ralph Goodell and James Prudden held interests in more than 10. Under 43 C.F.R. § 3833.1-6(a)(3) (1993), therefore, neither Goodell nor Prudden qualify for the small miner exemption. Accordingly, I concur in the result.

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Franklin D. Arness
Administrative Judge

I concur:

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John H. Kelly
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI DISSENTING:

The relevant regulation, 43 C.F.R. § 3833.1-6(a)(3) (1993), provided that "[m]ining claims held in co-ownership, or by an association of locators, by a partnership, or by a corporation shall be counted toward the 10-claim limit for claimants that have an interest in these entities." The majority 1/ interprets this provision as limited to those claimants that have a "controlling" interest in the corporation. Administrative Judge Arness' concurring opinion, on the other hand, would apply the provision to claimants who have "any" ownership interest in the corporation. Both agree that, insofar as the filings submitted by Ralph Goodell and James Prudden are concerned, both claimants violated the 10-claim limitation applicable to those seeking a small miner exemption. Since, for reasons which I will provide, I do not believe that this regulation can fairly be applied to any party having an interest in a corporation, I must respectfully dissent.

As written, 43 C.F.R. § 3833.1-6(a)(3) (1993) was exceedingly broad in scope, particularly as it related to corporations. It seemingly prevented any mining claimant who owned even a single share of stock in a corporation which, itself, owned 10 or more mining claims, from successfully availing himself of the small miner exemption. This, indeed, is the interpretation embraced by Judge Arness. But, while the language of the regulation may seem clear, it is, as the majority opinion suggests, equally clear from a review of the regulatory history of this provision that this is not what the Department intended.

The language of the regulation was originally proposed as 43 C.F.R. § 3833.1-6(a)(4) in the same form as ultimately adopted. See 58 Fed. Reg. 12885 (Mar. 5, 1993). There was no explication of the scope of this provision in the proposed rule. However, as the majority opinion notes, in promulgating the final regulations on this point, the Department addressed various concerns raised in comments to the proposed rule. Three responses, in particular, dealt with the presumed scope of this rule as it related to corporations.

Initially, the Department responded to concerns as to the possible scope of the proposed 43 C.F.R. § 3833.1-6(a)(4) as follows:

> One comment stated that paragraph (a)(4) excludes any person who owns stock in a mining corporation from qualifying personally

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1/ While a majority of the Board does, indeed, agree that appellants' stock ownership rendered them ineligible for the small miner exemption, only a plurality agree that this is so because the regulation provides for the cross-attribution of corporate holdings to individuals who "own or control" the corporation. Nevertheless, for the sake of convenience, the position of the plurality will be referred to as the "majority" position in the text of this dissent.

> and separately from the small miners exemption. This is not true because the legal corporation and the individual are separate entities under this section and are separately eligible for the small miner exemption.

58 Fed. Reg. 38190 (July 15, 1993) (emphasis supplied).

Notwithstanding the foregoing clear declaration that there would be no cross-over attribution of corporate ownership to individual stockholders, the Department subsequently proceeded to muddy the waters in a response to a suggestion that corporations should not be able to avail themselves of the small miner exemption:

> One comment said that the word "corporation" should be removed from the section that deals with entities who qualify for the small miner exemption. The entities listed in the rule, including corporations, have always been regarded as "claimants" under the Mining Law. The clear intent of the Act was to exempt all claimants, including corporations, holding 10 claims or fewer. However, there is nothing in the law or this rule to prevent arm's length stockholders of a corporation - stockholders without control - that possess mining claims from locating their own claims and qualifying as small miners, regardless of the number of claims held by the corporation.

58 Fed. Reg. 38192 (July 15, 1993) (emphasis supplied).

This latter analysis was reiterated later in the preamble in the discussion related to 43 C.F.R. § 3833.1-7 (1993), a section which does not address qualifications for establishing entitlement to the small miner exemption but rather deals with the filing requirements for doing so. In responding to a comment which questioned whether a person who was part of a corporation, association, or partnership that qualified for the small miner exemption could also qualify for an additional exemption in his or her own name, the preamble declared "[t]he answer is yes if the person is a noncontrolling shareholder of a corporation." See 58 Fed. Reg. 38193 (July 15, 1993).

These three statements are the only references to the possibility of attributing corporate holdings to individual stockholders and, notwithstanding the interpretative gloss liberally applied by the majority, while all of the statements clearly eschew any attempt to make minor stockholdings disqualifying if the company itself owns more than 10 mining claims, they essentially posit two different interpretations as to exactly what is prohibited under the regulation.

Initially, however, it must be admitted that the actual language used in 43 C.F.R. § 3833.1-6(a)(3) (1993) clearly would, if given an unfettered reading, prohibit a corporate stockholder from qualifying for a small miner exemption if the corporation holds 10 or more claims, even where the stockholder owned only a single share. Judge Arness, ostensively bowing to the

"plain meaning" doctrine, embraces a position that, regardless of what the clear intent of the regulation drafters might be, the "plain meaning" of the language used must ultimately prevail, come what may. While the simplicity of Judge Arness' approach may have some surface appeal, it is, as I shall show, wrong both in theory and in practice.

Judge Arness' approach seems to me to underline all of the pitfalls endemic to application of the "plain meaning" doctrine. This doctrine seems to derive its greatest utility when a reviewing body wishes to interpret a provision which is so "plain" in its meaning that a contrary interpretation supported in its statutory or regulatory history can simply be disregarded. This, of course, begs the question how, if the meaning is so plain, those adopting the provision managed to interpret it differently, but it can be a useful tool when one desires a result otherwise indefensible by normal adjudicative practice. And, it is in precisely this type of application that the "plain meaning" doctrine has been most criticized. Thus, Justice Frankfurter noted in his often-quoted dissent in United States v. Monia, 317 U.S. 424, 431-32 (1943):

> The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification. It is a wooden English doctrine of rather recent vintage, to which lip service has on occasion been given here, but which since the days of Marshall this Court has rejected, especially in practice. A statute, like other living organisms, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated. Especially is this true where the statute, like the one before us, is part of a legislative process having a history and a purpose. The meaning of such a statute cannot be gained by confining inquiry within its four corners. Only the historic process of which such legislation is an incomplete fragment - that to which it gave rise as well as that which gave rise to it - can yield its true meaning.

(Citations omitted.)

Moreover, even its most ardent supporters recognize that the "plain meaning" doctrine does not operate in vacuo and without limitation. Thus, the Supreme Court, itself, has noted that "[a]lthough language seldom attains the precision of a mathematical symbol, where an expression is capable of precise definition, we will give effect to that meaning absent strong evidence that Congress actually intended another meaning." Amoco Production Company v. Gambell, 480 U.S. 531, 548 (1987) (emphasis supplied).

This limitation has been recognized in other Federal court decisions as well as decisions of this Board. Thus, in Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982), the Court cautioned that "in rare cases the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters, and those intentions

must be controlling." (Emphasis supplied.) In Kenai Peninsula Borough v. Alaska, 612 F.2d 1210, 1213 (1980), aff'd sub nom. Watt v. Alaska, 451 U.S. 259 (1981), the Ninth Circuit Court of Appeals rejected application on the "plain meaning" doctrine, noting that "when a plain meaning reading of a statute brings that statute into conflict with another statute and disrupts a preexisting network of statutory provisions, it is appropriate to look to the legislative history for help in ascertaining congressional intent."

To similar effect have been decisions of this Board. For example, in Earl Williams, 140 IBLA 295, 303-304, 104 I.D. ___ (1997), the Board noted that "although the plain meaning rule focuses on the importance of a literal reading of the language of a statute, a 'literal interpretation of the words * * * should not prevail if it creates a result contrary to the apparent intention of the legislature,'" citing Norman J. Singer, 2A Sutherland Stat Const § 46.07 (5th ed. 1992). Similarly, in Dona Ana Board of County Commissioners, 116 IBLA 108, 110-11 (1990), the Board declared, with reference to 43 C.F.R. § 2912.1-1(c), that "[a]lthough the plain meaning of that regulation appears to be that the 'notice and opportunity for hearing' provision applies only to the inconsistent use situation and not to the nonuse situation, such a distinction makes little sense and is, in fact, contrary to the intent of the Department in promulgating the regulation." So, too, in Texaco, Inc., 102 IBLA 86, 88-90 (1988), the Board rejected a challenge based on the "plain meaning" doctrine to a regulation which defined "registered mail," as including either registered mail or certified mail.

Far from representing an interpretation consistent with the "plain meaning" rule, Judge Arness' rigid reliance on the rule in the face of uncontested evidence that the interpretation he espouses is not what was intended by those who wrote the regulation flies in the face of both Federal and Departmental adjudicative practice. 2/ His interpretation must be rejected.

2/ Correctly understood, the decisions upon which Judge Arness purports to rely are not to the contrary. Thus, while a number of Board decisions such as Marathon Oil Co., 139 IBLA 347, 353 (1997), James R. Ragsdale, 137 IBLA 243, 246 (1996), and Ronald Valmonte, 87 IBLA 197, 201 (1985), have declared that "[r]egulatory preambles * * * may be useful aids in the interpretation of an ambiguous regulation, but they cannot supplant the regulation, itself," these statements have, almost without exception, occurred as a response to claims by BLM that actions taken by an appellant, while not explicitly prohibited by the language of a regulation, were nevertheless contrary to the regulation's intent. In these cases, the Board has consistently declined to enforce requirements against appellants where such application went beyond what the language of the regulation expressly provided. Far from supporting the rigid application of the "plain meaning" doctrine, these decisions are, in fact, totally consistent with the principle that regulations should be so clear that there is no reasonable justification for noncompliance before someone is deprived of a statutory right. See, e.g., The Moran Corp., 120 IBLA 245, 259 (1991); A.M. Shaffer, 73 I.D. 293, 298 (1966); Donald C. Ingersoll, 63 I.D. 397 (1956).

The problem, however, is that, while the regulatory history is clear in establishing what the regulation does not mean, it is not clear in clarifying what it does mean. Thus, as was noted above, in response to a complaint that, as written, the regulation would prevent anyone who owned any stock in a mining corporation, which corporation itself held 10 mining claims, from personally qualifying for the small miner exemption, BLM responded: "This is not true because the legal corporation and the individual are separate entities under this section and are separately eligible for the small miner exemption." 58 Fed. Reg. 38190 (July 15, 1993). Nothing in this response could fairly be said to put claimants on notice that, under some circumstances, individual claimants would not be separately eligible for the small miner exemption.

Admittedly, as we noted above, in responding to a challenge to corporate entitlement to the small miner exemption, BLM suggested that there was "nothing in the law or this rule to prevent arm's length stockholders - stockholders without control - that possess mining claims from locating their own claims and qualifying as small miners, regardless of the number of claims held by the corporation," a declaration essentially replicated on the next page of the preamble. See 58 Fed. Reg. 38192, 38193 (July 15, 1993). But all the legal gymnastics in the world cannot make these latter statements consistent with the original analysis. 3/

The first statement, which is precisely directed to the question of stock ownership, flatly advises claimants, without any qualifications, that corporations and individual are separate entities and are separately eligible for the small miner exemption. The second statement which indicates that stockholders with "control" of a corporation, a term which is not only completely undefined but which does not even appear in the regulations, may be charged with ownership of all claims held by the corporation is tossed off two pages later, almost as an after-thought, not in the context of stock ownership by an individual, but rather in response to a challenge to the right of corporations to qualify for the exemption, while its subsequent reiteration appears in the analysis of a section of the regulations which does not even deal with the question of who is qualified for the small miner exemption. The majority, in effect, chooses the second approach over the first. This is a choice, I would suggest, that it is not theirs to make, particularly where it is necessarily retroactive in its impact.

It may be that the interpretation promulgated by the majority accurately reflects the intention of the drafters of the regulation. But that is not the issue here. The majority fails to distinguish between its authority to choose from conflicting interpretations that which it believes most probably represents the intention of the drafters and the more immediate question of whether every individual who attempted to comport himself

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3/ When the majority opines that "the responses may not be fully consonant," it indulges in monumental understatement. These two provisions clearly provide two different standards and, no matter how much linguistic legerdemain is applied, they cannot be honestly reconciled.

or herself to the regulatory prescriptions can fairly be penalized by the loss of their mining claims for failing to guess the approach ultimately selected by the majority of this Board.

Can it be seriously asserted that the regulatory history of this provision was so clear that no individual had a valid excuse for failing to comply with the majority's interpretation? Of course not. First of all, even the majority admits that the actual language of the regulation should not be followed. Second, there is the clear confusion manifested in the preamble of the regulation as to the scope of its prohibitions. And, I would point out, this confusion is not limited solely to the question of stock ownership. Thus, in responding affirmatively to an inquiry with respect to whether a "prospecting club" is an individual for purposes of qualifying for the small miner exemption, the preamble noted: "The club could be eligible if it holds 10 claims or fewer and meets the remaining requirements for exemption. The members of the club could not each claim a small miner exemption unless claims are held by one person individually, independently of the club." 58 Fed. Reg. 38190 (July 15, 1993). Apparently, under this interpretation there is no cross-attribution of claims for a "prospecting club," regardless of whether an individual owns or control the club. 4/ Moreover, this response appears on the same page as the response to the question concerning stock ownership, not two pages later, and would, therefore, likely reinforce the interpretation that there would be no cross-attribution of mining claims held be corporations regardless of whether or not an individual claimant might somehow be deemed to own or control the corporation.

I believe that any fair reading of the regulatory language of 43 C.F.R. § 3833.1-6(a)(3) (1993), particularly in light of the various statements contained in the preamble to the regulations, shows that the position of the Department as to the attribution of corporate ownership of mining claims to individual stockholders was, to put it mildly, uncertain. Clearly, the Department did not intend that it apply to all stockholders despite the fact that the regulation's plain language would indicate that it did. Less clear, however, is whether and the extent to which it was intended to apply to situations in which individual stockholders owned

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4/ This is a particularly strange response since, presumably, partnerships would automatically be subject to cross-attribution. Indeed, the statement quoted in the text of this opinion with respect to the rights of members of associations to personally claim the small miner exemption is expressly contradicted subsequently in the preamble to the rules. See 58 Fed. Reg. 38193 (July 15, 1993), "[I]f the person is a named partner or a named member of the association that holds 10 mining claims, that person cannot file for an additional 10 claim exemption." Not only is this conflict unfortunately symptomatic of the confusion engendered by these rules but, under the majority's approach herein, those members of prospecting clubs who individually filed for the small miner exemption in reliance on the initial statement in the preamble are clearly at risk that the majority of the Board will decide that they have guessed wrong as to the correct interpretation of these provisions as they relate to prospecting clubs.

or controlled corporations. 5/ Under such circumstances, I believe it appropriate to apply one of the cardinal principles of Departmental adjudication, viz., regulations should be so clear that there is no reasonable justification for noncompliance before someone is deprived of a statutory right. See, e.g., Exxon Co., U.S.A., 113 IBLA 199, 206 (1990); Ann Erhardt, 94 IBLA 317, 320 (1986); Brian D. Haas, 66 IBLA 353, 355 (1982); Inspiration Development Co., 54 IBLA 390, 396 (1981); Mary I. Arata, 4 IBLA 201, 204, 78 I.D. 397, 399 (1971); A.M. Shaffer, 73 I.D. 293, 298 (1966).

Fairness to those charged with complying with these regulations should compel us to conclude that no cross-attribution of corporate ownership of claims, regardless of whether or not a claimant might be deemed to "own or control" the corporation, can be enforced under this regulation. I note that there is no assertion that either Goodell or Prudden individually held more than 10 mining claims. Accordingly, I can find no basis in the record before us for disallowing the small miner exemption for which both Goodell and Prudden filed. I must dissent.

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James L. Burski
Administrative Judge

I concur:

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Bruce R. Harris
Deputy Chief Administrative Judge

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Gail M. Frazier
Administrative Judge

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C. Randall Grant, Jr.
Administrative Judge

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T. Britt Price
Administrative Judge

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5/ Thus, if it were the intent of the regulation drafters to limit application of the prohibition to stockholders who "owned or controlled" the corporation, one would assume that they might have made some effort to define the scope and ambit of "owned or controlled." Nor is there any statutory language which could fairly be said to put claimants on notice that, in certain circumstances, corporate holdings would be attributed to individual shareholders. In this regard, the 1992 Act should be contrasted with the provisions of section 10101(a) of the Act of Aug. 10, 1993, 30 U.S.C. § 28f(d)(2) (1994), and the implementing regulations, 43 C.F.R. §§ 3833.0-5(x)(2) and (y), 3833.1-6(a)(2) (1995).